

<b>COMPLIANCE BOARD OPINION NO. 02-2</b>
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February 25, 2002

*Mr. Neil M. Ridgely*

The Open Meetings Compliance Board has considered your complaint concerning the meeting practices of the Carroll County Commissioners. For the reasons stated below, the Compliance Board concludes that the Commissioners did not violate the Open Meetings Act by failing to provide in meeting notices a detailed description of agenda items or the reasons for an anticipated closed session. However, several procedural lapses did violate the Act. Specifically, with respect to certain meetings identified in your complaint, the presiding officer did not prepare the written documentation required by the Act prior to a closed meeting; the Commissioners occasionally failed to vote on the decision to close a meeting; and the Commissioners did not provide sufficient information about closed sessions in minutes made available to the public.

## **I**

### **Complaint and Response**

In essence, your complaint raises three issues: the amount of information provided to the public by the County Commissioners in their notices of meetings, the process by which meetings are closed, and the information shared with the public concerning the subject of a closed meeting.

Concerning meeting notices, you indicated your belief that “the Commissioners are not explicit enough in their agendas about the reasons these sessions are to be held without the benefit of public participation. Using the pure boilerplate language that a session is ‘Closed’ for a meeting with [a specified staff member] alone ... meet[s] neither the letter nor the spirit of the open meetings law.” Included with your complaint were copies of agendas as well as segments of the minutes of meetings provided to you by the County Attorney. The minutes selected were based on the County Commissioners’ meeting agendas that indicated certain agenda items as being “closed” or “executive session[s].”

Based on a review of these minutes, you complained that “[v]otes to close meetings are not regularly taken,” citing as examples the minutes of meetings held on September 4, September 6, and November 6, 2001. You also complained that “[a]

clear indication for the closure of the meetings is not being noted and maintained in the records. Further there is no indication of what vote transpired in closed session, if any.” Illustrative of the type of meeting you view as violating the Open Meetings Act is the meeting on December 11, 2001; the agenda for this meeting identified an item as being closed to the public, yet the meeting was in fact open.

In a timely response on behalf of the County Commissioners, Kimberly A. Millender, Esquire, Acting County Attorney, set forth in some detail the manner in which public notice of the Commissioners’ meetings is provided. Each Friday, when staff finalize the County Commissioners’ schedule for the following week, the agenda is posted on a bulletin board in a public area of the County Commissioners’ office and posted on the County’s web site. The agenda is also mailed to local news media and to others who have asked to be on an agenda mailing list. The agendas list the date and time of meetings. The agendas note those items that will be handled in executive sessions and other meetings that will be closed to the public. Unless otherwise noted, all meetings are conducted in the County Commissioners’ office.

Ms. Millender contended that, subject to a single exception, notice of the meetings referred to in the complaint correctly provided the information required by the Open Meetings Act. The sole exception involved the meeting held on December 11, 2001, which was advertised as closed, but then conducted in open session.<sup>1</sup> As for the description of each agenda item, Ms. Millender noted that the Open Meetings Act does not require such information in the meeting notice, although “this practice is encouraged by the Compliance Board.”

With regard to the process by which the Commissioners closed certain meetings, Ms. Millender acknowledged that the minutes of two meetings, September 4 and 6, 2001, failed to reflect a vote by the Commissioners. The minutes of other closed meetings reflected the Commissioners’ vote or involved an “executive session” to which the Open Meetings Act did not apply. In terms of the sufficiency of the record concerning each closed meeting, Ms. Millender summarized the information recorded and provided copies of the relevant portions of the minutes. While “the County Commissioners acknowledge that there are a few deficiencies in compliance with the Open Meetings Law raised [in the] complaint,” Ms. Millender outlined actions taken in an effort to achieve compliance, including the training of staff and distribution of a form developed by the Attorney General as an aid to public bodies when they close meetings.<sup>2</sup>

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<sup>1</sup> See note 6 below.

<sup>2</sup> See Office of the Maryland Attorney General, *Open Meetings Act Manual* App. C (4<sup>th</sup> ed. 2000).

## II

### Discussion

#### A. *Executive Sessions*

Prior to addressing the specifics of your complaint, we shall point out the familiar distinction between, on the one hand, meetings that are subject to the Open Meetings Act but that may be closed to the public in accordance with §10-508(a);<sup>3</sup> and, on the other hand, meetings in which the County Commissioners are engaged in an “executive function,” to which the Open Meetings Act generally does not apply and that, therefore, may be closed without regard to any of the Act’s procedural or other requirements. §10-503(a)(1)(i).<sup>4</sup> The materials submitted to us indicate that the County Commissioners met with specified staff members on five different dates (September 4, October 15, November 6, and December 11, 2001<sup>5</sup> and January 3, 2002) in “executive session.”

We understand the County Commissioners to be saying that these meetings involved executive functions only and, accordingly, the Open Meetings Act did not apply. Moreover, your complaint did not allege that the subject of these meetings exceeded the bounds of the executive function exclusion. Consequently, assuming

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<sup>3</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

<sup>4</sup> The statute reads:

(a) Except as provided in subsection (b) of this section, this subtitle does not apply to:

(1) a public body when it is carrying out:

(i) An executive function ....

Subsection (b) provides that the Open Meetings Act does apply when a public body meets to consider granting a license or a permit or to discuss zoning matters. As to the definition of an “executive function,” *see* §10-501(d). Last year, the Compliance Board addressed the executive function exclusion at length in an opinion concerning the Carroll County Commissioners. *See* Compliance Board Opinion 01-7 (May 8, 2001). In light of the focus of your complaint, we see no need to repeat that discussion here.

<sup>5</sup> The relevant portion of the December 11, 2001, agenda listed three items, the first of which was planned as an open session. The second item, listed as an “executive session,” was in fact held in an open meeting, although it was planned to have been closed; we discuss this matter further in note 6 below. The third item, listed as a closed session involving a personnel matter, apparently was postponed.

that these meetings were excluded from the Act, as we must do based on the information at hand, obviously no violation of the Act could have occurred.

**B.     *Agendas***

The County Commissioners give notice of their meetings through the publication of their weekly agendas. In doing so, the Commissioners already provide more information than is required by the Open Meetings Act. The Act, in §10-506(b), merely requires that:

Whenever reasonable, a notice ... shall:

- (1)     be in writing;
- (2)     include the date, time, and place of the session; and
- (3)     if, appropriate, include a statement that a part or all of a meeting may be conducted in closed session.

Given the wording of this provision, we have consistently held that “[a] public body is not required by the Open Meetings Act to state in a notice what it intends to do at a meeting.” Compliance Board Opinion 01-15 (July 13, 2001), slip op. at 2. *See also* Compliance Board Opinion 94-3 (May 27, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 67 (no violation of Act where description of agenda item may not have been sufficient to alert public of issue); Compliance Board Opinion 98-9 (December 14, 1998), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 31 (no violation of Act where public body voluntarily includes agenda in notice, but then changes sequence of items or adds to or deletes items from agenda).

To be sure, we have long encouraged public bodies to provide an agenda as part of a meeting notice. *See, e.g.*, Compliance Board Opinion 95-1 (April 13, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 110. Any additional information, voluntarily provided, that would help members of the public better understand the nature of a meeting is likewise to be encouraged. However, best practices are not synonymous with legal mandates. The County Commissioners do not violate the Act when they simply indicate in a notice that a meeting is expected to be closed, without providing the reasons for closing.<sup>6</sup>

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<sup>6</sup> Nor did the Commissioners violate the Act when, having told the public that an item on the December 11 agenda was expected to be discussed in closed session, the Commissioners in fact discussed the matter in open session. We need not discuss the

**C.     *Procedures for Closing a Meeting***

The second component of your complaint concerns the manner in which meetings are closed. The Open Meetings Act allows a public body to close a meeting for enumerated reasons, subject to specified procedural requirements. *See* §§10-508 and 10-509. Particularly relevant to your complaint are the requirements that, before the closed session, there be a majority vote in favor of meeting in closed session, §10-508(d)(1) and (2)(i), and that the presiding officer “make a written statement of the reason for closing the meeting, including a citation of the authority under [§10-508], and a listing of the topics to be discussed.” §10-508(d)(2)(ii).

The County Attorney acknowledged that the minutes of the September 4 and 6, 2001, sessions fail to reflect a vote prior to closure. Although we were not provided with the minutes for every agenda item in which the meetings were apparently closed, a review of the minutes made available to us reflect that the Commissioners voted to close the session as required under §10-508(d)(1) and (2)(i) in other instances.<sup>7</sup>

Apparently, the County Commissioners have not complied with the Act’s requirement that, immediately before a closed session, the presiding officer document in writing the reason for closing the meeting, the applicable authority under §10-508, and the topics to be discussed. §10-508(d)(2)(ii). *See* Compliance Board Opinion 01-12 (June 28, 2001), slip op. at 4 (level of detail required in public statement); Compliance Board Opinion 01-16 (July 23, 2001), slip op. at 3 (written statement under §10-508(d)(2)(ii) prepared after the fact violates Act). This statement is a matter of public record. §10-508(d)(4). However, the only documentation apparently available is the “County Commissioner Notes,” which we understand serve as the minutes of the meeting, and which are obviously prepared after the fact. The Open Meetings Act grants a member of the public a right to object to the closure of a meeting that is subject to the Act. §10-508(d)(3). Failure to

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circumstances, if any, under which such a change would violate the Act. For present purposes, it suffices to say that the Act is not violated when notice of an executive function activity turns out to be erroneous, for the Act does not apply to the nature or content of this notice.

<sup>7</sup> The November 19, 2001, agenda, for example, referred to four items in which the Commissioners were to conduct closed sessions. The items dealt with land acquisition, legal advice, pending litigation, and an economic development project. Although there is no reason that a public body cannot group together matters to be addressed in a closed session, the portions of minutes provided us only address the closure in connection with a land acquisition. Of course, we express no opinion as to the propriety of the process involving items for which no information was provided. Your complaint made specific reference to the November 6, 2001, meeting; however, the only portion of the minutes provided us for the meeting held on that date appears to involve an executive function.

comply with the documentation requirements prior to meeting in closed session erodes this right, because it deprives those in attendance of an important tool to evaluate whether the closed session comports with the law.

**D. Minutes**

The final aspect of your complaint concerns the sufficiency of minutes of closed sessions available for public inspection.

The Open Meetings Act has three distinct public disclosure mandates in connection a closed meeting. Together and collectively, these disclosures are meant to hold a public body accountable for its decision to close a meeting. The first of these, as discussed in Part IIC above, requires completion of a written statement, in accordance with §10-508(d)(2)(ii), prior to closing the meeting. The second element of disclosure is that the members are obliged to hold a recorded vote about closing the meeting while still in open session, and this vote is to be recorded as part of the minutes of the open session. §10-509(c)(1)(iii). The third disclosure requirement must be met after a closed meeting, when the public body must include in the minutes of the *next* open session: (i) a statement of the time, place, and purpose of the closed session, (ii) a record of the vote of each member as to closing the session, (iii) a citation of the authority under the Act for closing the session, and (iv) a listing of the topics of discussion, persons present, and each action taken during the closed session. §10-509(c)(2).<sup>8</sup>

The County Commissioners apparently have sought to fulfill in the requirements of §10-509(c)(2) by including a summary of the closed meeting in the minutes prepared for the public portion of the Commissioners' meetings conducted the same day, rather than in the minutes of the next open meeting. Assuming that members of the public are familiar with this practice, we shall not criticize the Commissioners for being more timely than the law requires.

With regard to the adequacy of the disclosure, however, we begin by reiterating our long-standing view that the summary of a closed meeting must go beyond a mere parroting of the statutory exception:

The Open Meetings Act requires a statement of *both* the purpose *and* the topics of discussion. The latter

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<sup>8</sup> Minutes of all meetings, closed as well as open, must be kept. §10-509(c)(1). Subject to limited exceptions, the minutes of the closed session are normally not available to the public unless the public body votes in favor of unsealing the minutes and any recording of the session. §10-509(c)(3)(iii). When a meeting is closed under §10-508(a)(5) or (6), the minutes and any recording are to be open following the investment of funds or marketing of public securities, respectively. See §10-509(c)(4)(i) and (ii).

provision ... affords an opportunity for interested members of the public ... to find out the basics of what happened at a closed session.... To be sure, the level of detail in the ... minutes of the ensuing open session may preserve the confidence of information that led to the session's being closed in the first place.... Nevertheless, a public body can describe the topic related to its need for legal advice without disclosing confidences. It can say in the minutes, for example, that the topic of discussion was consideration of a settlement proposal in a lawsuit without disclosing any details about the proposal. But language that gives the public no information whatever about the topic of discussion is insufficient....

Compliance Board Opinion 98-5 (June 18, 1998), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 18, 20 (citations and quotations omitted; emphasis in original). With this guidance in mind, we turn to the minutes of those meetings that were closed to the public (other than the “executive sessions” to which the Act did not apply).

**1. September 4, 2001:** The minutes of this session, captioned “Department of Permits, Inspections, and Review Staff Time,” indicate that the County Commissioners met with individuals named in the minutes “to discuss contract negotiations and to receive legal advice” and that “[n]o action was taken.” As the County Attorney noted, there is no record of a vote taken prior to the closed session. Nor is there a citation for the authority under which the meeting was closed. While it would appear that the County Commissioners relied on §10-508(a)(7) and (14), the description is clearly inadequate in that at best it restates the exemption and gives the public no further information to evaluate the purpose and topic of the Commissioners’ discussions.

**2. September 6, 2001:** The minutes of this session indicate that the County Commissioners met with those individuals named in the minutes concerning “pending litigation and receipt of legal advice” and that “[n]o action was taken.” As the County Attorney noted, there is no record of a vote taken prior to the closed session. While the meeting was obviously closed pursuant to §10-508(a)(7) and (8), the minutes fail to cite the applicable authority for closing the meeting. Furthermore, the description of the meeting is clearly inadequate.

**3. October 15, 2001:** The minutes of this session, captioned “Department of Citizen Services Staff Time,” indicate the County Commissioners’ vote for closing the meeting as well as the individuals with whom the County Commissioners met. The purpose was for obtaining “legal advice” and the minutes indicate that “[n]o

action was taken.” Although the meeting was obviously closed under §10-508(a)(7), the minutes do not cite the applicable authority, nor do they describe the purpose of the meeting and topics discussed.

**4. November 19, 2001:** The minutes of this session, captioned “Department of Planning Staff Time,” indicate that the County Commissioners voted to close the meeting to discuss “land acquisition.” The minutes name those who attended the meeting and indicate and that the Commissioners voted to grant “preliminary approval of a Critical Farm Application.” While the Commissioners were apparently relying on §10-508(a)(3), the minutes fail to cite the applicable authority or share with the public any meaningful description of the topics discussed.

**5. January 3, 2002:** The minutes indicate that the County Commissioners voted to meet in closed session with their attorney “to receive legal advice, pursuant to Title 10 of the State Government Article.” The minutes indicate that the Commissioners “voted to allow the Ethics Commission to hire outside counsel, if necessary, for a confidential inquiry.” Although the minutes of this session provide a more detailed description, we simply note that the reference to “Title 10 of the State Government Article” is inadequate. The Open Meetings Act requires that the public body cite the applicable authority under the Act. §10-509(c)(2)(iii). Read in conjunction with §10-508(d)(2)(ii), this requirement means that, in closing a meeting under the Act, the public body must cite the applicable exception under §10-508(a).

In summary, the minutes of the sessions reviewed fall short of the level of information that the Open Meetings Act requires a public body to share with the public following a closed session.

### **III**

#### **Conclusion**

The Open Meetings Act does not require a public body to describe each agenda item in its meeting notice or set forth in the notice the reasons why a meeting is expected to be closed. Therefore, the County Commissioners’ omission of such information did not violate the Act. The County Commissioners did violate the Act, however, when they closed meetings that were subject to the Act without voting to go into closed session and by failing to document their justification for meeting in closed session as required by §10-508(d)(2)(ii) prior to closing the meetings. Furthermore, the description of the closed meetings included in the portion of the minutes issued to the public does not satisfy the requirements of §10-509.

In her response on behalf of the County Commissioners, the Acting County Attorney outlined certain steps taken to promote future compliance with the Act,



including distribution of forms recommended by the Attorney General for use in closing a meeting, “as a reminder to staff on the requirements of the law.” While these actions are commendable, we remind the County Commissioners that ultimate responsibility for compliance with the Act is theirs.

OPEN MEETINGS COMPLIANCE BOARD

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